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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-515

AMERICAN SECURITY COUNCIL EDUCATION FOUNDATION,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,
and
UNITED STATES OF AMERICA,
Respondents,

CBS, INC.,
Intervenor.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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The American Security Council Education Foundation (ASCEF) hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case. The Decision of the court below *en banc* reversed a prior Decision by a panel of the court and affirmed the Decision of the Federal Communications Commission in

refusing to consider Petitioner's fairness doctrine complaint against CBS, Inc.

OPINIONS BELOW

The opinion of the court of appeals, *en banc* (App. A, *infra* pp. 1a-109a) has not yet been reported. The opinion of the panel of the court of appeals (App. B, *infra* pp. 110a-173a) is reported at 4 MED L. RPTR 1516. The opinion of the Federal Communications Commission (App. C, *infra* pp. 174a-182a) is reported at 63 FCC 2d 366 (1977).

JURISDICTION

The final judgment of the court of appeals *en banc* was entered on June 29, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 2350(a).

QUESTIONS PRESENTED

1. Whether the Federal Communications Commission has adopted a *de facto* policy of avoiding consideration of substantial Fairness Doctrine complaints on the pretext of alleged procedural infirmities, and whether this procedure has resulted in a *de facto* unilateral abandonment of the protections embodied in the fairness doctrine for the benefit of the public.

2. Whether the complaint in the instant case was rejected by the Commission based upon this *de facto* policy.

3. Whether the Federal Communications Commission has the authority or jurisdiction to unilaterally change or modify the protections embodied in the Fairness Doctrine.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

This case directly involves interpretations of the First Amendment to the Constitution of the United States and Section 315(a) of the Communications Act of 1934, 48 Stat. 1088, as amended, 47 U.S.C. 315(a), both of which are set forth in Appendix D, pp. 183a-184a, *infra*. To the extent that the reviewing court failed to compel agency action unlawfully withheld, this case also involves Section 706 of the Administrative Procedure and Judicial Review Act, 80 Stat. 393, 5 U.S.C. 706, which is also set forth in Appendix D.

STATEMENT

The American Security Council Education Foundation (ASCEF) is a non-profit educational institution whose purpose is to improve public understanding of facts and issues relating to the national security of this country.[1] In general, the members of ASCEF share a common concern that a strong national security of the United States is the most effective deterrent to war and the best method to assure continued peace. Although ASCEF was

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[1] At the time of the study and complaint the Board of Directors of ASCEF included many notable citizens concerned with their country's national security posture including, among others, The Honorable Mills E. Godwin, Jr., former Governor of Virginia; Robert W. Galvin, Chairman of the Board of Motorola, Inc.; George R. Hearst, Jr., publisher of the Los Angeles Herald-Examiner; James S. Kemper, Jr., President of Kemper Insurance Companies; The Honorable Clare Boothe Luce, former United States Congresswoman; Dr. Arthur L. Peterson, Chairman of the Department of Politics and Government of Ohio Wesleyan University; and John R. Woods, Vice President of E.F. Hutton and Company, Inc. A complete listing may be found at Appendix A, pp. 82a and 83a. The composition of the Board is relatively unchanged.

well aware that other citizens or groups of citizens were of the opinion that these goals could best be served by attempting to maintain the "status quo" or by actually reducing national security and that they had a right to hold those views, ASCEF had serious concern that the public was not being fairly exposed to all three of these approaches so that it could come to its own informed conclusions.

Specifically, ASCEF perceived what it thought to be a consistent and pervasive bias in television network news coverage of national security issues slanted toward the "dovish" point of view and contrary to or ignoring the more hardline or "hawkish" point of view on the same subject. ASCEF was well aware that general "feelings" or "perceptions" were too imprecise to form the basis of any complaint to the networks (or of any subsequent fairness doctrine complaint) and recognized that any such request for relief would have to be predicated upon a solid factual and statistical analysis which would obviously be quite expensive in terms of both time and money.

After careful consideration, ASCEF decided that the project would be worthwhile to determine once and for all whether or not the television networks were providing generally fair coverage to all sides of important questions involving the state of our national security. Accordingly, in December of 1972 each of the networks was advised of ASCEF's intention to undertake an exhaustive and definitive study on that subject.

Although ASCEF originally planned to study and analyze all three major networks, it became clear early on that attempting to apply the elaborate methodology envisioned by ASCEF to all three networks would be beyond the limits of time and money available. Rather than

reduce the methodology from the full scientific analysis originally planned, ASCEF decided to examine only one network. Since CBS was by far the largest in terms of total affiliates and potential viewers, it was chosen for the analysis.

As originally conceived, the raw analysis was to be conducted upon copies of the CBS Evening News for 1972 and 1973 which had been videotaped and stored by Vanderbilt University. Unfortunately, five months after ASCEF notified CBS of its impending study, CBS commenced copyrighting of the CBS Evening News and in December of 1973 filed a civil suit against Vanderbilt University to enjoin it from making any further recordings of the CBS Evening News and to surrender or destroy all copies of past copyrighted programs.[2] Notwithstanding CBS's obvious aversion to analysis, ASCEF successfully performed its analysis on the actual videotapes for 1972 and on indices and abstracts prepared by Vanderbilt based upon the 1973 news programs.

The study itself was structured to include independent experts and scholars to assure that it was not only unbiased but that its independence was patent. Initially, a group of 11 research analysts, most from outside ASCEF and most with advanced academic degrees, were recruited to undertake the basic analytical work. Ernest W. Lefever, a Senior Fellow at the Brookings Institution, was chosen to coordinate the research and write a final report on the findings. In a further attempt to guard against error or bias in the analysis, an independent review panel consisting of eight scholars with established academic and/or diplomatic credentials was organized to review

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[2] *CBS, Inc. v. Vanderbilt University*, Civ. No. 7336 (M.D. Tenn.) dismissed without prejudice, December 20, 1976.

work in progress, procedures, and preliminary findings and to prepare written comments on the final draft manuscript prior to publication.[3]

The basic analysis employed by ASCEF for the year 1972 was a Viewpoint Analysis Method[4] closely resembling the three option approach used by the Brookings Institution in analyzing the U.S. Budget. This method basically categorized statements into one of three options: Viewpoint A, that the threat to U.S. security is more serious than perceived by the government and that the U.S. should *increase* national security efforts; Viewpoint B that present government policy is correct as is; and Viewpoint C, that the threat to U.S. security is *less* serious than perceived by the government and U.S. security efforts should be *decreased*.

The data drawn from the 1973 CBS news programming was subjected to a topic and theme analysis as were other CBS News and Specials studied subsequently. Necessarily, a full description of the methodology used is beyond the limitations of this petition, however a further discussion is contained in Appendix A hereof, pp. 84a-109a.

The results of the complete study were finalized in late 1974 preparatory to printing and publication of the final report. Prior to publication, ASCEF sent a copy of the Report to CBS, stated its charges of bias and distortion as documented by the study and requested that CBS take

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[3] A listing of the names and titles of the members of the Independent Review Panel may be found at Appendix A, pg. 82a.

[4] Described at another time by Dr. Charles Winick as a consultant for CBS as "an established technique" and a "powerful tool" for the systematic description of communication content (see Appendix A, pg. 84a).

some corrective action. After some additional correspondence on the subject, CBS notified ASCEF on April 23, 1975, that it found no violation of the fairness doctrine and would not respond to ASCEF's complaint.

The full study was published in October of 1974 in an extensive book of over 200 pages entitled *TV and National Defense, an Analysis of CBS News, 1972-1973.* The book, which was available commercially, received widespread distribution, and was widely reviewed by independent media critics, scholars and leading newspapers and journalists. The study included detailed data, charts, and supporting documentation of its findings and concluded that there was a clear and unmistakable bias and distortion in CBS News in selecting and presenting news items relating to the national security of the United States.[5]

The reaction of the various reviewers to the report indicated that the subject matter of the study was not only comprehensible but that it had in fact made a very persuasive case of bias and distortion against CBS News.[6]

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[5] For example, the study indicated that in 1972, the CBS Evening News presented Viewpoint C (doing less about national security) 61.83% of the time; Viewpoint B (the *status quo* position of the government) 34.63% of the time; and Viewpoint A (doing more about national security) only 3.54% of the time.

[6] A copy of the basic study was incorporated by reference with the complaint filed with the FCC and included as a Supplement to the Joint Appendix at the court of appeals. Similarly, a reprint of thirty reviews and comments on the substance of this report was also a part of the complaint filed with the FCC (although, strangely enough, the FCC did not seem to be aware of this, see App. B, pg. 12a, footnote 30) and included at pg. 23 of the Appendix at the court of appeals. Since their size and shape make them inappropriate for the Appendix to this Petition, they have not been

[footnote continued]

Notwithstanding the public reaction to the ASCEF study, CBS continued to refuse to consider the complaint, and so advised ASCEF in April of 1975. ASCEF thereupon undertook further analysis to update its findings to determine if CBS, while publicly refusing to consider the complaint, might actually have sought to restore some balance to its programming.[7] The results of this further analysis of CBS News, indicated no significant change was found in the pattern of distortion and bias revealed in the original analysis. Since CBS had already affirmed its refusal to consider the complaint, ASCEF had only one remedy available, a complaint to the Federal Communications Commission under the fairness doctrine. On September 8, 1976 the formal complaint was filed with the Commission incorporating the original study results and noting four specific points of view on national security that had been all but ignored by CBS News,[8] and which

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included. However, since they are both quite relevant to the question of whether the FCC could have possibly or reasonably found that the complaint failed to state even a *prima facie* case, a copy of the report and the reviews of that report have been lodged with the Clerk's office simultaneously with the filing of this Petition.

[7] ASCEF purchased and analyzed scripts of the CBS Evening News for the entire year of 1975, and through May of 1976. It also recorded and analyzed all CBS-TV News programs for the last two weeks of May 1, 1975 totalling an analysis of thirty seven months of programming over 1972, 1973, 1975, and 1976.

[8] They were that:

1. The Soviet Union still has the objective of eventual world domination.
2. The Soviet Union is militarily superior to the United States.
3. The United States should be militarily superior to the Soviet Union.
4. The United States should have the objective of winning the conflict between the two systems.

demonstrated areas of opinion unreasonably and improperly ignored by CBS News. Parenthetically, it is also noteworthy that while later attacking the general methodology used in the study, neither the Commission nor the court *en banc* ever addressed the fact that these important issues had been left untreated by CBS News.

Five months later on March 15, 1977, the FCC issued its *Memorandum Opinion and Order* (Appendix C herein pp. 174a-182a) which rejected the ASCEF complaint for failing to state a *prima facie* complaint under the fairness doctrine. Since the Commission had concluded that the complaint did not even state a *prima facie* case it followed its usual "summary" procedure in such cases and did not forward the complaint to CBS for review or comment but simply dismissed it outright.

On May 12, 1977, ASCEF filed a Petition for Review with the U.S. Court of Appeals for the District of Columbia Circuit claiming that it had been improperly denied its rights under the fairness doctrine and requesting the court to direct the commission to process the complaint (i.e. to forward the complaint and request a response from CBS and then to render a decision as to whether relief should or should not be accorded). Oral argument was held before a panel of the court in April of 1978, and a decision rendered in favor of ASCEF on September 18, 1978 (App. B, pp. 110a-173a). In its decision (Judge Tamm dissenting) the panel held that threshold *prima facie* requirements are allowed as a requirement in fairness complaints to prevent broadcasters from being saddled with the task of "answering idle or capricious complaints" but that the complaint of ASCEF was not at all idle or capricious, had clearly met the Commission's published *prima facie* requirements and that therefore the

Commission was required to follow its own rules and to process the complaint accordingly.

In so finding, the court commented upon the Commission's apparent reluctance to process the fairness complaint in this case (and in general) based upon alleged procedural infirmities, and noted that Commissioner Robinson in 1976 had referred openly to the fact that although the commission continues to indicate the validity and availability of the fairness doctrine to the public, that the "FCC's enforcement of the fairness doctrine has always been less than vigorous", *Reconsideration of Fairness Report* (Dissent), 58 FCC 2d at 710. Even more to the point was the comment of Commissioner Johnson in 1973 where he claimed that the commission had evolved a "procedural straight-jacket" which in effect "denies [the public] a substantive ruling until they meet a burden that, as a practical matter, can never be met." (See *Diocesan Union of Holy Name Societies* (Dissent), 43 FCC 2d at 548-49 and App. A, pg. 55a, footnote 20).

The court reiterated that the only question to be decided here was whether ASCEF had submitted a *prima facie* complaint sufficient to be processed under the fairness doctrine, and not whether it should prevail ultimately upon the merits. In specific response to the areas claimed by the Commission as its basis for denying the complaint consideration, the court found that "the FCC's inability to grasp the issue presented here can only be described as willful obtuseness"[9] (App. B, pg. 124a), that the alleged "inadequate definition" of the complaint

[9] Also noting this was especially apparent and obvious in this case since ASCEF had put in evidence copies of 30 newspapers and magazine articles discussing its study of CBS and that no one there had any apparent difficulty in either identifying or discussing the issue. (App. B, pg. 124a, see also footnote 6, *supra*).

must be rejected ". . . and in view of the well-considered and substantial quality of the complaint in this case, the Commission's verdict is virtually unprecedented. 'Inadequate definition' must not be used as a device for arbitrarily eliminating fairness complaints which the Commission for some reason may not want to process" (App. B, pp. 127a). The court also noted that the question of whether national security is a "controversial issue" was not before them but that the commission had already found in a different case that the question of US-USSR military relations is a controversial issue of public importance" (App. B, pg. 127a, footnote 42). Finally, the court found that ASCEF had clearly established itself as a 'regular viewer' as defined by the Commission's own rules and had easily exceeded the amount of viewing necessary to support the complaint (App. B, pg. 135a). The court then ordered the Commission to process the complaint (i.e. to "make inquiry of CBS").

Both CBS and the FCC petitioned for re-hearing *en banc* which was subsequently granted by the court. At the same time the court vacated the panel's opinion. The case was re-argued *en banc* on December 21, 1978, and a decision rendered June 29, 1979, affirming the Commission's dismissal of the ASCEF complaint (Judges Wilkey, MacKinnon and Robb dissenting).

Judge Tamm, who had been a dissenting member of the panel that originally heard the case, wrote the majority opinion for the court *en banc* affirming the Commission (App. A, pp. 1a-26a). In his opinion, Judge Tamm recognized that the Congress had referred with approval to the fairness doctrine (originally only a policy of the FCC) and incorporated its existence into legislative amendment of Section 315(a) of the Communications Act (See App. D, pg. 183a) and that this Court had not

only upheld the constitutionality of the fairness doctrine in *Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367 (1969) (App. A, pp. 7a & 8a, footnote 12) but as recently as 1978 in *FCC v. National Citizens Comm. for Broadcasting,* 436 U.S. 775 at 795, had reaffirmed the public interest benefit in achieving "the widest possible dissemination of information from diverse and antagonistic sources." Notwithstanding this recognition of the firm foundation occupied by the fairness doctrine the court then proceeded to cite with apparent approval (at App. A, pg. 16a) statistics demonstrating what could at best be called a less than vigorous enforcement of the fairness doctrine.[10] The court continued on to indicate that responding to fairness complaints in any case is a "substantial burden on the broadcaster" and that

> Unless a broadcaster can recognize the issue with precision and accuracy . . . proof of compliance with the fairness doctrine would require the production of recordings or transcripts of all news programs, editorials, commentaries, and discussion of public issues, many of which are treated over long periods of time. The Commission has wisely determined that imposition of such onerous burdens on broadcasters would, in practice, defeat the policy of encouraging robust, wide-open debate. (citations omitted) App. A, pg. 24a).

Judge Tamm then went on to conclude that the ASCEF complaint had used a "blunderbuss approach to the fairness doctrine" that would have unduly burdened CBS if it had to respond (App. A, pg. 24a) and that the

[10]Specifically, that in fiscal 1973, the commission refused to even request a broadcaster response (let alone relief) in 96% of the complaints it had received from the public.

commission had acted properly in weeding out "those complaints [such as ASCEF's] that would burden broadcasters without sufficient likelihood that a countervailing benefit will be gained" (App. A, pg. 26a).

Judges Wright and Bazelon each filed separate concurring opinions with Judge Wright generally agreeing with the majority opinion that ASCEF failed to state a *prima facie* complaint but with Judge Bazelon going substantially further in noting, first of all, substantial doubt that the fairness doctrine should be applicable *at all* to daily news coverage[11] and, secondly, that the benefits of the entire fairness doctrine concept have become questionable and should be re-examined.[12] In a footnote to his opinion, Judge Bazelon noted that the Supreme Court in *Red Lion* "left open the possibility that the constitutional implications of the fairness doctrine might require re-examination if experience should demonstrate that the doctrine had failed to promote diversity", and it appears from Judge Bazelon's opinion that he feels such a re-examination is now warranted.

Judge Wilkey, joined in dissent by Judges MacKinnon and Robb saw the Court's action as "converting the *prima facie* evidence standard into an open-ended 'prudential' doctrine allowing the commission to decline juris-

[11]"unlike the personal attack and political editorial components of the fairness doctrine upheld in *Red Lion*, applying the fairness doctrine to daily news coverage poses a serious threat to the independence of the broadcast press" (App. A, pg. 43a).

[12]"As that factual predicate [scarcity of broadcast frequencies] is called into question, courts may well be required to reassess the statutory and constitutional validity of the fairness doctrine's restraints on the independence of broadcast journalism" (App. A, pp. 44a-45a).

diction over hard cases" (App. A, pg. 46a). While reiterating his opinion that the ASCEF clearly had met the *prima facie* rules established by the Commission for fairness complaints, Judge Wilkey alluded to a much more substantial problem intertwined in this case, to wit that:

> We cannot help but sense that something more serious than a mine run question of *prima facie* evidence has been decided today. The tone and rationale of the majority opinion suggest that the wagons are being drawn about the fairness doctrine in a fashion assured to deflect the most worrisome fairness complaints—those, like petitioner's, alleging pervasive and continuous imbalance in the coverage of controversial matters. (App. A, pg. 52a) . . . If this burden is too much for the television licensee to carry, then what the majority is saying is that the fairness doctrine is too much of a burden for the television licensee to carry, and that there is no way under the fairness doctrine by which a broadcaster can be held to account on a really large and important issue, e.g., U.S.-Soviet relations. If this is the ultimate majority opinion holding, such a holding should be recognized as such and reconsidered at the very highest level. (App. A, pg. 74a).

Notwithstanding the differences between the majority and minority opinions of the court, it thus appears that at least four of the Judges hearing this case in the U.S. Court of Appeals for the District of Columbia Circuit (the three judges in dissent and Judge Bazelon) are in agreement that further guidance and review on this subject is urgently needed from this Honorable Court.

REASONS FOR GRANTING THE WRIT

This case presents an important issue concerning the Federal Communications Commission's responsibilities in administering the fairness doctrine and the rights of the public in administration of the fairness doctrine. It clearly appears from the commission's past record of performance, the public statements of at least two past Commissioners, and the Commission's action in the instant case that the Commission is loathe to process fairness doctrine complaints at all, and is far more concerned with the "burden" involved in requesting broadcasters to examine and comment upon the complaints than in providing any response on the merits to those citizens whose concern has prompted them to lodge the complaint.

It is submitted that something is terribly wrong when the commission rejects 96% of the complaints it receives upon "procedural grounds" and evinces such gross fear in requesting that a broadcast licensee simply consider and respond to a complaint while showing little if any concern for the rights and sensibilities of the public it is supposed to serve. In short, we submit that the commission is avoiding its clear responsibility to administer the fairness doctrine and in so doing has left the public with no remedy at all in cases of biased or distorted programming. Petitioner respectfully submits that the Commission should be instructed to perform its assigned function in administering the fairness doctrine or the public should be honestly and openly informed that the protections and remedies embodied in the fairness doctrine are illusory or unenforceable and do not exist for them.

1. There can be no question that on paper, at least, the requirements and areas of protection of the fairness doctrine have been well-defined by the legislature, the judici-

ary[13] and the commission itself. In all cases, from the commission's first establishment of the fairness doctrine as a policy[14] through its ratification as law by the Congress and its recognition by this Court in *Red Lion* and succeeding cases[15] it has included the mandate that

> coverage of issues of public importance must be adequate *and must fairly reflect differing viewpoints.*[16] (emphasis supplied)[16]

Judge Bazelon in his concurring opinion in this case has indicated dissatisfaction with the fairness doctrine *per se* but it is most relevant to note that of three recent congressional bills (all proposed as legislation in 1979) directed at a replacement or revision of the existing *Communications Act of 1934, none* proposed to eliminate the fairness doctrine as it applies to television, and that it thus appears there is no indication at all of any congressional intent or acquiescence to deletion of the fairness doctrine.[17] The commission itself issued a *Notice of Inquiry*, FCC 78-108, docket 78-60, on March 2, 1978, requesting comment upon alternate means of achieving fairness[18] and ensuring that the public is properly informed about controversial issues of public importance, but it would appear that any adjustments it might seek to make *in futoro* would be limited and that it could not abandon the basic mandate of the existing policy absent legislation by the Congress.

As recently as July of 1974, the commission released a comprehensive *Fairness Report,* 48 FCC 2d 1, which exhaustively stated its *official* policy on consideration of fairness doctrine complaints. In March of 1976, it further clarified these requirements in its *Reconsideration of Fairness Report,* 58 FCC 2d 691 (1976). Based upon these written pronouncements the complaint submitted by ASCEF was proper, met the commission's procedural requirements, and should have been considered on the merits. For example, the commission indicated:

> The fact that regular viewers or listeners have not been exposed to an opposing viewpoint is obviously not conclusive evidence that the viewpoint has not been presented, but it does indicate that there is a reasonable basis for the viewer's conclusion that such is the case. See *Allan C. Phelps,* 21 FCC 2d 12

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[13] See *supra* at pages 12 and 13 relative to the legislative and judicial recognitions of the existence and legitimacy of the fairness doctrine.

[14] *Report on Editorializing by Broadcast Licensees,* 13 FCC 1246 (1949).

[15] See footnote 13 *supra*.

[16] See *Columbia Broadcasting system, Inc. v. Democratic National Committee,* 412 U.S. 94, 111 (1973).

[17] The proposed legislation was 1, a proposed total re-write of the Communications Act authored by Congressman Van Deerlin (H.R. 3333) which at §462 specifically retained the fairness doctrine for television; 2, an amendment to the Communications Act by Senator Hollings (S. 611) which did not propose to remove or amend the existing fairness doctrine protection; and 3, an amendment to the Communications Act by Senator Goldwater (S. 622) which proposed the virtual elimination of the fairness doctrine from radio (§333) but made no such proposed deletion for television (§334). None of the bills have left committee.

[18] Other means being explored by the Commission include such approaches as "first-come, first served" access time but there appears to be little support for this concept. Since the date of the *Notice*, the commission has issued no further statements on this inquiry.

[footnote continued]

(1969). *Accordingly, we believe that it is a sufficient basis for a Commission inquiry to the station. Fairness Report* of 1974 (*supra*) at paragraph 53. (emphasis supplied)

In this case, of course, the viewers (ASCEF) claimed (and documented) *exactly that,* but contrary to the above statement, the commission refused to even make an inquiry of CBS.

At paragraph 44 of its *Fairness Report* it stated:

> We have made it clear, for example, that "it is patently unreasonable for a license consistently to present one side in prime time and to relegate the contrasting viewpoint to periods outside prime time. *Similarly, there can be an imbalance from the sheer weight of one side as against the other".* This imbalance might be a reflection of the total *amount of time* afforded to each side, of the *frequency* with which its side is presented, of the size of the listening *audience* during the various broadcasts, or of a combination of factors. It is incumbent upon a complainant to bring to the Commission's attention any specific factors which he believes point to a finding that fairness has not been achieved . . . (first emphasis supplied)

And at paragraph 52 of the same *Fairness Report,* the following, describing the amount of detail required for a complaint:

> [The Commission] does not require that the complainant listen to or view the station 24 hours a day, seven days a week. One example of a "regular" television viewer would be a person who routinely (but not necessarily every day) watches the evening news and a significant portion of the public affairs programs of a given station . . . Also, the assumption that a station has failed to present an opposing viewpoint would be strengthened if several regular viewers or listeners joined together in a statement that they have not heard a presentation of that viewpoint. Complainants should specify the nature and extent of their viewing or listening habits, and should indicate the period of time during which they have been regular members of the station's audience.

Purely and simply, this is *exactly* what ASCEF did and it conducted its study so thoroughly and in such detail that Judge Wilkey was constrained to refer to it as ". . . more thorough . . . than probably any other complaint which the FCC has received under the fairness doctrine". (App. A, p.g. 73a). Consistent with Judge Wilkey's opinion, the study supporting the fairness complaint was described thusly by reviewers other than the FCC:

> [the book] reports the work of a group of scholars mobilized by the Institute of American Strategy . . . [The] transcripts were subjected to a rigorous academic bombardment of content analysis, parsed by subject, theme, viewpoint and personalities quoted . . . some of the study findings are downright shocking even for someone long accustomed to a significant leftist lean in the television antenna.
>
> Eugene H. Mehtvin, Senior Editor
> of *Reader's Digest*

> A burst of scholarly activity [resulting in] a 200 page book complete with charts, statistics and footnotes to prove that CBS news virtually ignored a significant viewpoint on national defense shared by many americans.
>
> John Alexander, *Charlotte News*

> The Institute charges CBS News with imbalance and the charge is well taken. The evidence amassed by the Institute is overwhelming . . . On the record,

CBS News evidently failed to meet requirements of the fairness doctrine in its coverage of national security news.

James J. Kilpatrick, Syndicated Columnist

The only conclusion one can ready after reading Lefever's book is that CBS systematically favored views it supported over views it opposed, in some cases almost to the exclusion of opposing views. It also appears to have been guilty of serious omissions of news that could have helped viewers form balanced opinions, particularly in the area of national defense. Thus CBS apparently has failed to live up to the Federal Communications Commission's fairness doctrine . . . The implications of this . . . study are enormous. Unless CBS can refute the findings, which it has not done to date, it means that the national television network which had the largest evening news audience has been propagandizing Americans rather than giving them a fair, comprehensive account of the news.

St. Louis Globe Democrat, editorial

And finally, these comments by Dr. John P. Roche, Professor at the Fletcher School of Law and Diplomacy, Tufts University, and former chairman of Americans for Democratic Action, writing in his weekly *News Watch* column in *TV Guide:*

> The focus of the book is not advocacy of the Institute's position, but an exploration of the degree to which CBS News simply ignored the existence of any such viewpoint . . . this is a first class piece of scholarship . . . one of the things that gives this study its probative worth is the absence of polemical overtones . . . Without going into the substance, I submit that Lefever has made a compelling case that the hard-line viewpoint never got an adequate hearing.

> (And I disagree with the hard-liners on many issues) . . . It's not a matter of who's right; it is a simple question of fairness. There is more, much more, but in my judgment Lefever has demonstrated that CBS news was far more engaged in molding national opinion on foreign affairs and security issues than it was with reflecting the reality.[19]

The point is not that these independent observations by critics and journalists prove the merits of the complaint, but it is submitted that they clearly establish *at least* the existence of a *prima facie* complaint that should have been processed and considered by the commission.[20] We submit that the commission's dismissal of this complaint upon procedural grounds clearly illustrates the existence of an abusive practice by the commission which denies the rights and protections of the fairness doctrine to the people and which must be corrected.

2. In the preceding section, Petitioner attempted to show sufficient facts, within the limits of this petition, to illustrate the existence of an abusive practice by the FCC

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[19] A full copy of the study and of full reviews of the study has been lodged with the Clerk of this Court, see footnote 6).

[20] To be sure, in Judge Tamm's opinion for the Court *en banc* he referred on several occasions to a publication by "F. Friendly" that generally derogated the methodology of the ASCEF study (See App. A, pg. 3a and 4a, footnotes 3 and 5). It should be noted however that this publication, *The Good Guys, The Bad Guys and the First Amendment* (1975) was authored by Fred W. Friendly, past president of CBS News who also might reasonably be expected to be somewhat more sympathetic to his past colleagues at CBS as "Good Guys", with only one other category left for those who might be critical of CBS. In any event, whatever criticism Mr. Friendly might have raised relative to the ASCEF study could have been appropriately included in a CBS response to the complaint (and their relative merits weighed at that time) had the commission processed the complaint as it should have in the first place.

in its continued and wholesale rejection of substantive fairness complaints upon alleged procedural grounds. Petitioner does not claim that the fairness doctrine is the only or best way to protect the public's right to unbiased news and opinion on important issues but submits that since it is held out to the public as the *only* remedy in such cases, it *must* be actively observed and enforced by the FCC consistent with its own published rules.

The problem is that it has now become clear that the protections of the fairness doctrine intended for the well-being of the *public* have been twisted 180 degrees into a protective shield to actually insulate *broadcasters* from scrutiny and that the public has been left with no remedy at all to redress the evils for which the fairness doctrine was intended. We submit that the instant case illustrates the existence of a problem in the sensitive area of First Amendment protection that impacts upon every citizen of this country. If Commissioner Robinson was correct, if Commissioner Johnson was correct, if the three dissenting judges of the U.S. Court of Appeals are correct and if Petitioner is correct, then there has been a grand theft of the public's right to demand basic fairness from broadcast businesses. Since this has occurred by a *de facto* policy of non-enforcement by the FCC without benefit of legislative change or deletion of the fairness doctrine requirements, the case presents an important issue of substantial weight which deserves the attention of this Honorable Court.

Although at this time, the fairness doctrine is the one and only established remedy available to to the public to correct bias, distortion, or unreasonable imbalance in broadcast presentations of controversial issues of public importance, the commission seems to be consumed with the concept of protecting broadcasters from

the burden[21] of responding to fairness complaints to the point that the public benefit of an unbiased forum to hear the public's complaints has been effectively emasculated. It is not that the Petitioner or anyone else is even complaining about an adverse decision on the merits from the commission. The complaint is that the commission has developed the very handy and efficient habit of rejecting almost all complaints out-of-hand on alleged technical or procedural infirmities so that the complaint is never communicated to the broadcaster for response and there is never any need for any finding by the commission on the merits of the complaint.

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[21] On principle, ASCEF would not object to the "burden" to a licensee being considered as one factor in the commission's preliminary analysis, and that in a close case a different result might be reached as between a small daytime radio station and a large television network. In the instant case, the question of "burden" must be decided within the context of the work and burden already carried by *petitioner* as against the "burden" for CBS in responding to the complaint. According to the latest figures from the FCC the three major television networks in 1978 had a combined income from network and station operations of over $559 million dollars, *FCC News Report* #19540, released July 30, 1979. Surely, the burden of answering this complaint could have been carried. It is also noteworthy that CBS seemed to have sufficient funds to attempt to block inspection or analysis of its programming by copyrighting the CBS Evening News and bringing suit against Vanderbilt University to stop distribution or use of copies of those programs (see footnote 2, *supra*). In so doing, CBS seemed to have no hesitation at all in seeking to increase the burden on ASCEF or any subsequent member of the public who sought to examine CBS programming. Whatever the ultimate outcome on the merits of the complaint, ASCEF does not believe that the requirement of a response from CBS would have been an undue burden for them, nor that whatever introspection might have been required to respond to the complaint would have caused them any unbearable harm.

The petitioner is not unmindful of the proper and legitimate function of the commission to undertake a preliminary analysis of all complaints claiming fairness doctrine violations and to reject those that are clearly frivolous[22], devoid of factual allegations or not directed to controversial issues of public importance. However, the commission has obviously gone well beyond the proper limits of that threshold showing and is regularly automatically rejecting, without consideration, serious and well-documented complaints which *should* have been forwarded to the broadcaster for response and which should have *then* been decided as meritorious or not by the commission.

The commission has become too solicitous and protective of its licensees and in its zeal to spare them the "burden" of responding to a complaint from the public has denied the public of its only forum. The commission takes too much pride in the barrier it has erected between an unhappy public and the broadcaster. In paragraph 19 of its *Fairness Report*, 48 FCC 2d 1, the commission recognizes that:

> As a matter of general procedure, we do not monitor broadcasts for possible violations, but act on the basis of complaints received from interested citizens.

But then to illustrate how effectively it screens broadcasters from "idle or capricious complaints", it cites with great pride the fact that it rejected, *out-of-hand* 2306 complaints out of 2400 complaints received in fiscal year

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[22] For example, the commission recently rejected (and properly, we think) a complaint based upon an alleged derogatory treatment of eyeglass wearers (by letter to Henry M. Henderson, FCC 79-461).

1973. Out of 2400 complaints only 94 were even forwarded to the licensee for comment.

Of even greater impact is the fact that in a two year period covering 1973 and 1974, the Commission received 4280 formal complaints and of these only *19–four tenths of one percent*–resulted in any finding adverse to the licensee, and most of these related to political editorials and personal attack violations.[23] Although we undoubtedly have the best broadcast system in the world, it is a bit much to believe that they are quite that pristine. It also would seem beyond practical belief that 2306 complaints out of 2400 submitted to the commission were so *procedurally* defective that they could be rejected without consideration on the merits or even bothering to ask for comment from the licensee involved.

So, while the commission on one hand says it relies upon complaints by interested citizens, in reality it rejects without consideration almost every complaint filed. At that rate even interested citizens will soon get the message that they might as well not waste their time or money, but where do they go from there for relief?

Petitioner submits there is no better illustration of the commission attempting to duck its responsibility to consider a fairness complaint than the instant case where the complainant went "by the numbers" in documenting the bias and in using every available scientific and statistical tool to assure the most objective and un-biased measure of the problem. Petitioner continued to follow the commission's recommendation by attempting to resolve the problem directly with CBS. Only when this proved fruit-

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[23] See *Reconsideration of Fairness Report*, 58 FCC 2d 691, Commissioner Robinson's dissent at footnote 5.

less did ASCEF finally plead its case to the FCC. But although the study had been hailed by others as scholarly, thorough, well-documented and a first rate piece of scholarship demonstrating shocking findings of systematic bias, the FCC claims it is unworthy of consideration *at all*, that it doesn't even state a *prima facie* case of bias, that it should join the other thousands of complaints in the rejected category, and that CBS should not be burdened by being required to respond to the complaint.

ASCEF submits that in the most notorious days of formal common law pleading one could not find a more egregious and outrageous avoidance of a substantive complaint through reliance upon an alleged procedural infirmity. The difference in this case from others that have undoubtedly preceded it is that in *this* case the patent absurdity of the commission's conclusion is clearly visible and stands in stark contrast to the overwhelming evidence to the contrary.

It is respectfully submitted that the commission abused its discretion in this case by denying consideration of ASCEF's complaint under the fairness doctrine, and that the application of the fairness doctrine and the commission's duty to enforce that doctrine by consideration of substantive complaints such as that filed by ASCEF must be clarified by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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